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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SYLVIA SARTIN TORRENCE, individually, and as Legal Guardian for the use and benefit of Minor Daughter Jamira Dariel Torrence, and as the Administratrix at law of the Estate of Deceased Husband, James Dariel Torrence; and NANNIE PETERS, individually, as Legal Guardian of the Minor, Quadarius Rashad Gatlin,
Petitioners,

v.

ORYX ENERGY COMPANY, PETROLEUM ENGINEERS, INC., and BUDDY WEAVER
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT, STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. May the United States Court of Appeals for the Fifth Circuit refuse to follow other Courts of Appeals and prior decisions of this Honorable Supreme Court and refuse to recognize that United States Coast Guard regulations impose non-delegable duties and that a violation thereof constitutes *negligence per se* on the part the owner of an oil drilling platform and the independent contractor hired to safely operate it?

PARTIES TO THE PROCEEDING

Petitioners

SYLVIA SARTIN TORRENCE, individually, and as Legal Guardian for the use and benefit of Minor Daughter Jamira Dariel Torrence, and as the Administratrix at law of the Estate of Deceased Husband, James Dariel Torrence; and NANNIE PETERS, individually, as Legal Guardian of the Minor, Quadarius Rashad Gatlin. Petitioners are individuals and have no corporate affiliations.

Respondents

Oryx Energy Company, W. S. Weaver, Buddy; Signa Engineering Corporation.

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OPINIONS BELOW

On the 8th day of July, 1999, the United States District Court for the Eastern District of Louisiana, The Honorable Ginger Berrigan, granted motions for summary judgment filed by W.S. "Buddy" Weaver, Oryx Energy Company and Signa Engineering Corporation and issued a judgment and reasons therefor. *Appendix,* pp. 3a-12a. The Plaintiffs herein, Sylvia Torrence, individually and as the legal guardian for the use and benefit of the minor daughter, Jamira Dariel Torrence, and as administratrix at law of the estate of her deceased husband, James Daniel Torrence, and Nannie Peters, individually and as legal guardian of the minor child, Guadarius Rashad Gatlin, appealed from that ruling. On May 5, 2000, the United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling. *Appendix,* p. la-2a. The decision of the United States Court of Appeals for the Fifth Circuit is unpublished.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on May 5, 2000. This Petition for Writ of Certiorari is filed within the prescribed period of ninety (90) days after May 5, 2000. The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. §§ 1254 (1) and 2106.

STATUTORY AND REGULATORY PROVISIONS

This case involves regulations set forth in 33 C.F.R. Parts 142 and 143 (June 20, 2000), specifically: 33 C.F.R. § 142.4(a) and (b) (June 20, 2000); and 33 C.F.R. § 143.1110

(a) (June 20, 2000). These authorities are reprinted in pertinent part in the *Appendix,* at pp. 13a-15a. This case also involves the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, *et seq.* Specifically, this case involves 43 U.S.C. § 1333 (d). This section, 1333 (d), is reprinted in the *Appendix,* at pp. 16a-20a

STATEMENT OF THE CASE

The petitioner, Sylvia Torrence, is the wife of the decedent, James Daniel Torrence, the administratrix at law of his estate, and the mother their minor child, Jamira Dariel Torrence. The petitioner, Nannie Peters, is the legal guardian of James Daniel Torrence's minor child, Rashad Gatlin. Petitioners have sued Oryx Energy Company, the owner of the offshore fixed platform, the High Island A 385 D, Signa Engineering Corp., an independent contractor hired to operate the High Island A 385 D, and W.S. "Buddy" Weaver, Oryx's "company man" on the High Island A 385 D.

On January 3, 1997 at approximately 6:30 a.m., James Dariel Torrence was working aboard Oryx's platform, in an area surrounding Pool Company's drilling rig. The drilling rig had been placed on the High Island rig in such a fashion as to require the removal of the safety rails which protected the occupants of Oryx's platform from falling into the Gulf of Mexico. Because of the drilling rig's placement, the safety rails were removed and the drilling rig's mud tanks extended over the sea. Replacement handrails had not been prefabricated, and there were no replacements on the rig or platform. The placement of the drilling rig and the removal of Oryx's railing were done in accordance with a schematic blue print which Pool submitted to Oryx and/or Signa Engineering Corp. (*Appendix,* 2la.).

Pool, through its employee Henry Loomis, ordered James Torrence to span the open spaces created by the placement of its drilling rig. Rather than utilize the federally mandated hand rails or wire mesh fencing, Pool ordered Torrence to use rope. Subsequently, Torrence fell some eighty feet into the waters of the Gulf of Mexico and his body was never recovered. The United States Coast Guard issued a presumptive death certificate and predicated thereon, the State of Mississippi issued a death certificate.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE COURTS BELOW HAVE CREATED AN IMPERMISSIBLE CONFLICT AMONG THE CIRCUITS AND WITH PREVAILING FEDERAL LAW. AS A MATTER OF FEDERAL AND TEXAS LAW, REGULATIONS AS SET FORTH BY THE UNITED STATES COAST GUARD IMPOSE NON-DELEGABLE DUTIES AND VIOLATIONS THEREOF CONSTITUTE NEGLIGENCE *PER SE*.

This Honorable Supreme Court, and several of the Courts of Appeal, have held without equivocation that a violation of a United States Coast Guard regulation, set forth in the Code of Federal Regulations, constitutes negligence *per se*. *See, e.g. The Pennsylvania,* 86 U.S. 125, 19 Wall. 125, 22 L.Ed. 148 (1874); *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958); *Jones v. Spentonbush-Red Star Co.*, 155 F.2d 587 (2d Cir. 1998); *Duty v. East Coast Tender Service, Inc,* 660 F.2d 933 (4th Cir. 1981); *Reyes v. Vantage S.S. Co.*, 609 F.2d 140 (5th Cir.

1996); and *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514 (9th Cir. 1996). The decisions of the courts herein below have cut against the grain of this precedent, to the detriment of petitioners and an entire class of workers who are specifically protected by Coast Guard regulation.

The United States Coast Guard is vested with the authority to enforce worker safety regulations on fixed platforms on the Outer Continental Shelf. *Herb's Welding, Inc. v. Gray,* 105 S.Ct. 1421, 1435, 470 U.S. 414, 438 (1985). This appointment indicates Congress' intent to recognize that the conditions and hazards faced by those who do business *on* great waters are very similar to the perils faced by those who do business *in* great waters. *Id.*, 105 S.Ct. 1435, 470 U.S. 438. In the very words of this Honorable Supreme Court, "[t]hus Congress and the Coast Guard have recognized that the offshore locality of platform workers' work significantly affects their working conditions." *Id.*

"The failure to follow any Coast Guard regulation which is the cause of an injury establishes negligence *per se*." *Daugherty v. Santa Fe Marine, Inc.*, 698 F.2d 232, 235 (5th Cir. 1983) (citing *Kernan v. American Dredging Co.*, 355 U.S. 426, 438-39, 78 S.Ct. 394, 401, 2 L.Ed.2d 382 (1958; *Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 143 (5th Cir. 1980)). These safety regulations create a non-delegable duty on the part of the platform owner and operator. *Evans v. Chevron Oil Co.*, 438 F.Supp. 1097 (E.D. La. 1977) (citing *Armstrong v. Chambers & Kennedy,* 340 F.Supp. 1220 (S.D. Tex. 1972); and *In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974)).

The two courts below, the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Louisiana, wrongfully failed

to find Oryx Energy Company, Signa and W.S. "Buddy" Weaver negligent for the violation of two specific Coast Guard regulations. This failure has deprived an innocent oil worker of civil remedies against those parties upon whom the burden of offshore safety should rest.

Oryx Energy Company (hereinafter referred to as "Oryx") was the mineral lessee and owner of the High Island A 385 D fixed platform. Oryx hired Torrence's employer, Pool Company (hereinafter "Pool"), as an independent contractor, to operate Pool's drilling rig, which was to be placed on the Oryx platform. (R. Vol. 4, p. 965, par. 10.). Signa Engineering Corporation ("Signa"), another independent contractor, hired W.S. "Buddy" Weaver, again, an independent contractor, to act as the drilling consultant.

The Code of Federal Regulations, 33 C.F.R. § 142.4 (June 20, 2000), set forth that:

> (a) Each holder of a lease or permit under the Act shall ensure that all places of employment within the lease area or with the area covered by the permit on the OCS are maintained in compliance with workplace safety and health regulations of this part and, in addition, free from recognized hazards.
>
> (b) Persons responsible for actual operations, including owners, operators, contractors, and subcontractors, shall ensure that those operations subject to their control are conducted in compliance with workplace safety and health regulations of this part and, in addition, free from recognized hazards.

As 33 C.F.R. § 142.4 (b) states, the owner of the High Island A 385 D, Oryx, and its operators and subcontractors, Signa, Pool and Buddy Weaver were required to "[. . .] ensure that those operations subject to their control [were] conducted in compliance with workplace safety and health regulations of this part [. . .]." 33 C.F.R. § 142.4 (b) (June 20, 2000). 33 C.F.R. § 143.110 (a) (June 20, 2000) mandates that:

> (a) [. . .] the unprotected perimeter of all floor or deck areas and openings shall be rimmed with guards and rails or wire mesh fence. The guard rail or fence shall be at least 42 inches high. The two intermediate rails shall be so placed that the rails are approximately evenly spaced between the guard rail and the floor or deck area: [. . .].

Every entity on the High Island rig, whether corporate or company man, was responsible for worker safety. 33 C.F.R. § 142.4 (b) (June 20, 2000) The decisions of the lower courts herein have confused prior federal jurisprudence, threaten to eviscerate the effect of Coast Guard regulation and have subjected maritime oil field workers to a situation wherein platform owners and operators have no economic incentive, in the form of exposure to potential civil liability, to meet their obligations under federal law.

The federal regulations recited above, ones which could have prevented Torrence's death, were promulgated by the Secretary of the Department of Transportation, the Department under which the Coast Guard currently operates

and operated at the time of Torrence's death[1]. They apply, as noted above, pursuant to an act of Congress, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (West 2000). Specifically, 43 U.S.C. § 1333 (d), states that:

> (d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations
>
> (1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.
>
> (2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section wherever the owner has failed suitably to mark such island,

---

[1] The United States Coast Guard, a branch of the armed forces of the United States, operates under the Secretary of the Department of Transportation, 49 U.S.C. § 108(a)(1), except in time of war, or when the President otherwise directs, when it operates under the Secretary of the Navy. 14 U.S.C. § 3.

> installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

The lower courts have somehow determined that 33 C.F.R. § 142.4 and 143.110 were promulgated by the Mineral Management Service, an agency of the United States government which operates under the Department of the Interior. *See, e.g., Dupre v. Chevron U.S.A., Inc.*, 109 F.3d 230 (5th Cir. 1997). This is simply not the case. The aforementioned regulations are promulgated by the Secretary of the Department of Transportation. They are Coast Guard regulations, the violation of which, as has been previously argued, constitutes negligence *per se*. They impose non-delegable duties. To hold otherwise undercuts the Coast Guard's authority to regulate safety in the oil field and degrades the primacy of place given that agency by Congress and recognized by this Honorable Supreme Court. *See,* 43 U.S.C. § 1333 (d) (West 2000); *see, also, Herb's Welding, Inc. v. Gray, supra.*

The courts below completely ignored the non-delegable nature of defendants' burdens as established by the Coast Guard regulations. In a case heavily relied upon below to Torrence's detriment, a case factually on point with this one, it was held by the United States Court of Appeals for the Fifth Circuit that its prior decisions in *Olsen v. Shell Oil Company,* 561 F.2d 1178 (5th Cir. 1977), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979) (referred to hereinafter as *Olsen), Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117, 1121 (5th Cir. 1978) (referred to hereinafter as *Bourg*), and *Romero v. Mobil Exploration & Producing North America, Inc.*, 939 F.2d 307 (5th Cir. 1991) (referred to hereinafter as *Romero)* prevent the finding of liability pursuant to 33 C.F.R. §§ 142.4 and 143.110. *Dupre,* 109

F.3d at 231 (5th Cir. 1997). None of those cases, relied upon by the Fifth Circuit in *Dupre,* and herein, were concerned with Coast Guard regulations.

Romero, 939 F.2d 307 (5th Cir. 1991), involved the application of two Mineral Management Service regulations: 30 C.F.R. § 250.50 and 30 C.F.R. § 250.56 (d) (3). *Id.,* 939 F.2d at 308-09 & nn 2-3. *Bourg,* 578 F.2d 1117 (5th Cir. 1978), addressed 30 C.F.R. § 250.45 and 30 C.F.R. § 250.46. *Id.,* 578 F.2d at 1119. *Olsen,* 561 F.2d 1178 (5th Cir. 1977), involved 30 C.F.R. § 250.30, 30 C.F.R. § 250.45, and 30 C.F.R. § 250.46. *Id.,* 561 F.2d at 1182. Again, these three cases involved regulations put forth by the Mineral Management Service and Secretary of the Interior. They do not touch on the application of Coast Guard regulations, which are set down upon the oil platforms by Congress through the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333 (d).

The opposition to this argument is that if Mineral Management Service regulations do not give rise to liability, and if, as established in *Clary v. Ocean Drilling and Exploration Company,* 609 F.2d 1120 (5th Cir. 1980), and *in Mallard Bay Drilling, Inc. v. Herman,* 212 F.3d 898 (5th Cir. 2000), Occupational Safety and Health Administration regulations do not either, then Coast Guard regulations should not be any different. This ignores, however, the traditional and unique importance given to Coast Guard regulations in the maritime law, *see, e.g., Herb's Welding, Inc. v. Gray, supra.*

The ultimate issue herein is, finally, whether or not a violation of a Coast Guard regulation constitutes a non-delegable duty upon Oryx, Signa and "Buddy" Weaver under Texas law. Texas law applies to this case as Texas is the

riparian state closest to the platform. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). It is applicant's contention that Defendants' violation of 33 C.F.R. § § 142.4 (b) and 143.110 (a) constitute negligence *per se* under Texas law and that the duties imposed by these Coast Guard regulations were, and are, non-delegable.

Under Texas law, "[t]he unexcused violation of a statute setting an applicable standard of care constitutes negligence as a matter of law is the statute is designed to prevent an injury in that class of persons to which the injured party belongs. *El Chico Corporation v. Poole,* 732 S.W.2d 306, 312 (Tex. 1987). Further, a duty imposed on a party by law cannot be delegated to an independent contractor. *Mbank El Paso, N.A.v. Sanchez,* 836 S.W.2d 151, 153 (Tex. 1992) (citing *Restatement (Second) of Torts* § 424 (1965)). It is obvious that the pertinent Coast Guard regulations at issue herein are specifically designed to protect oil platform workers such as Torrence from the very hazards which claimed his life. Thus, under federal and Texas law, Defendants should not have been able to shift their responsibilities for worker safety onto Pool.

CONCLUSION

The lower courts committed manifest legal error in entering judgment against Petitioner. The petitioners, Sylvia Torrence and Nannie Peters, respectfully ask that this Honorable Supreme Court accept this matter for review and address the actions taken by the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Louisiana. An established rule of law, that Coast Guard regulations create non-delegable

duties, has been ignored. The effect of this error is to allow those parties vested with the responsibility for worker safety to escape liability for the deaths and injuries of those workers the Coast Guard is specifically charged with protecting.

Respectfully Submitted,

WIEDEMANN & WIEDEMANN

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-30793

[Filed: May 5, 2000]

SYLVIA SARTIN TORRENCE, individually and as legal guardian for the use and benefit of minor daughter, Jamira Dariel Torrence, and as administratix of law of the estate of deceased husband, James Dariel Torrence; NANNIE PETERS, individually, and as legal guardian of the minor, Guadarius Rashad Gatlin,
Plaintiffs-Appellants,

v.

ORYX ENERGY COMPANY; ET AL.,
Defendants,

ORYX ENERGY COMPANY; W.S. WEAVER, Buddy; SIGNA ENGINEERING CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(97-CV-3242-C)

Before REAVLEY, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:*

The judgment of the district court is affirmed essentially for the reasons stated in its thorough Order and Reasons of July 8, 1999.

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D., LOUISIANA

No. Civ. A. 97-3242

[Filed: July 8, 1999]

SYLVIA SARTIN TORRENCE, individually, and as Legal Guardian for the use and Benefit of Minor Daughter, Jamira Dariel Torrence, and as Administratix at Law of the Estate of Deceased Husband, James Dariel Torrence; and NANNIE PETERS, individually, as Legal Guardian of the Minor, Quadrius Rashad Gatlin,
Plaintiffs,

v.

ORYX ENERGY COMPANY, Petroleum Engineers, Inc., and Buddy Weaver,
Defendants.

ORDER AND REASONS[1]

BERRIGAN J.

This matter is before the court on renewed motions for summary judgment filed by defendants Oryx Energy Company ("Oryx"), Signa Engineering Corp. ("Signa"), and Buddy Weaver ("Weaver"). The motions were originally denied because plaintiffs' discovery was unfinished. Upon completion of discovery, the renewed motions were submitted on the briefs. Having considered the record, the memoranda of counsel and the law, the Court has determined that both motions should be GRANTED for the following reasons.

BACKGROUND

Oryx contracted with Pool Company ("Pool") to perform workover drilling services on the Oryx fixed platform located in Block 385 of the High Island Area of the Gulf of Mexico. Pool acted as an independent contractor and thus was responsible for all operational details of the drilling work consistent with the agreement. On January 3, 1997 at approximately 6:30 a.m., James Daniel Torrence ("Torrence"), a Pool employee, allegedly fell from the Oryx platform and apparently drowned.

The night prior to Torrence's accident, Pool had removed a portion of the handrails in order to load the drilling unit and mud pumps onto the platform. The result was a

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[1] Nancy J. Kim, a second year law student at Tulane Law School, assisted in the research and preparation of this decision.

temporary gap in the platform handrails. According to Harry Loomis ("Loomis"), a Pool driller's Unsworn Declaration Declaration under Penalty of Perjury,[2] the following *morning* he ordered Torrence to rope off the gap until permanent handrails could be installed. Further, Loomis testified that he had cautioned Torrence about the dangers associated with the gap.

At the time of the accident, there were no other Oryx employees on the platform. However, Oryx had hired a Sigma employee, Buddy Weaver ("Weaver"), to act as a drilling consultant. While the contract does not specify Weaver's duties, Oryx argued that he was hired as an independent contractor and had no authority to direct or interfere with the work being done by Pool.[3] Loomis and another Pool employee, Clarence Kelly, Sr. ("Kelly") confirm Oryx's statement in their depositions.[4] In addition, Weaver stated in his deposition that he was unaware that the handrails were being removed by Torrence and did not know that Torrence would be working without a harness or lanyard.

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[2] Counsel for Oryx advised that Loomis' deposition would be filed with the court, but at the time of this order it has not yet been filed. Counsel has assured that Loomis confirmed all of his statements in the Unsworn Declaration in his deposition.

[3] The Pool-Oryx contract specified that Pool had sole control over all operational functions.

[4] Loomis and Kelly testified that Weaver was not involved in the removal of the handrails nor did he have the authority to instruct or direct Pool employees.

Plaintiffs filed a suit against Oryx, Weaver, and Petroleum Engineers, Inc. ("Petroleum") for negligence in the Civil District for the Parish of Orleans, Petroleum was eventually dismissed and plaintiffs amended their petition to include defendant Signa. The suit was removed to this Court based on federal jurisdiction under 28 U.S.C. § 1331 applying the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2).

DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the mover is entitled to summary judgment as a matter of law." Fed.R.Civ. Proc. 56(c). *See Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The burden is on the moving party to show the absence of genuine issues as to any material fact with the opposing party viewed in a most favorable light. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A genuine issue of material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 1986). Once the movant meets its burden, the non-movant can oppose the motion by setting forth specific facts showing that there is a genuine issue of material fact. *Celotex*, 477 U.S. at 321-22.

As Oryx's platform was located on the Outer Continental Shelf off the coast of Texas, the Outer Continental Shelf Lands Act. 43 U.S.C. § 1333 requires the use of Texas substantive law. In order to prove a claim in negligence, the claimant must show that defendants owed

them a legal duty which was breached and caused actual damage, *Williams v. Olive*, 912 S.W.2d 319, 327. (Tex. Ct. App. 1995) (overruled on other grounds) (citing *El Chico Corp. v. Peele*, 732 S.W.2d 306, 311 (Tex. 1987)). In Oryx's motion for summary judgment, they allege that they had no legal duty to protect the employees of the independent contractor particularly if the accident arose from an act by the independent contractor. Weaver and Signa make a similar argument in their motion.[5] "The general rule is that an employer or conic is not liable for the torts of an independent contractor or of the latter's servants." *Gaspard v. Cox*, 583 S.W.2d 877, 878. (Tex. Civ. App. 1979) (citing *Cameron Mill & Elevator Co. v. Anderson*, 81 S.W. 282 (1904)). Therefore the independent contractor, not the owner or occupier of the premises, is liable to its employees for injuries sustained while performing the contractor's work. *Id.*

There are exceptions to the general rule imposing liability on the independent contractor. One exception noted in the defendants' summary judgment motion is when the general contractor or principal retains or exercises operational control over the details of the independent contractor's work. *Williams v. Olivo*, 912 S.W.2d 319, 328 (Tex. Ct. App.1995); *See also Bryant v. Gulf Oil Corp.*, 694 S.W. 2d 443,4 47 (Tex.App. 7th Dist. 1985). The type of control required of the general contractor must be more than a "general right to order the work to start or stop, to inspect progress, or receive reports." *Williams v. Olive*, 912 S.W.2d

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[5] Weaver and Signa erroneously applied Louisiana law in their motion, but their argument is supported by Texas law cited in Oryx's motion for summary judgment.

at 328; *See also Restatement (Second) of Torts § 414*. When the general contractor controls any aspect of the work, he becomes subject to liability for harm to those individuals whose safety he now owes a duty to exercise reasonable care. *Id.*

Another exception highlighted by Oryx is based in premises liability. An occupier of land owes a duty of ordinary care to an invitee such that the occupier maintain the premises in a reasonably safe condition or to warn the invitee of any dangerous condition which the occupier knows or should have known about and which are not reasonably apparent to the invitee. *Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 445 (Tex.App, 7th Dist.1985). However, the owner or occupier of the premises are generally not required to ensure that the independent contractor perform its work in a safe manner. *Williams v. Olive*, 912 S.W.2d at 328 (citing *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex.1985); *See also Bryant v. Gulf Oil Corp.*, 694 S.W. 2d 443,445 (Tex.App. 7th Dist. 1985). There is no affirmative duty to ensure that the independent contractor is working safely especially if the independent contractor is creating the dangerous situation. *Bryant*, 694 S.W.2d at 446.

The evidence establishes that both Signa and Pool were independent contractors. As for the exceptions to the general rule that a party is not liable for the possible torts of an independent contractor, neither Oryx nor Signa falls into either of the noted exceptions. First, the Pool-Oryx contract as stated before specified that Oryx would not have operational control of Pool's work. Moreover, the undisputed evidence indicates that neither Oryx nor Signa in fact exercised any such control. The depositions of Loomis, Kelly,

and Buddy Weaver ("Weaver") established that Pool had exclusive control of the method and equipment involved in the work and of giving direction and supervision to its employees.

There are exceptions to the general role imposing liability on the independent contractor. One exception noted in the defendants' summary judgment motion is when the general contractor or principal retains or exercises operational control over the details of the independent contractor's work. *Williams v. Olivo*, 912 S.W.2d 319, 328 (Tex.Ct.App. 1995); *See also Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 447 (Tex.App. 7th Dist. 1985). The type of control required of the general contractor must be more than a "general right to order the work to start or top, to inspect progress, or receive reports." *Williams v. Olivo*, 912 S.W.2d at 328; *See also* Restatement (Second) of Torts § 414. When the general contractor controls any aspect of the work, he becomes subject to liability for harm to those individuals whose safety he now owes a duty to exercise reasonable care. *Id.*

Another exception highlighted by Oryx is based in premises liability. An occupier of land owes a duty of ordinary care to an invitee such that the occupier maintain the premises in a reasonably safe condition or to warn the invitee of any dangerous condition which the occupier knows or should have known about and which are not reasonably apparent to the invitee. *Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 445 (Tex.App. 7th Dist. 1985). However, the owner or occupier of the premises are generally not required to ensure that the independent contractor perform its work in a safe manner. *Williams v. Olivo*, 912 S.W.2d at 328 (citing *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex.1985); *See also Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 445

(Tex.App. 7th Dist. 1985). There is no affirmative duty to ensure that the independent contractor is working safely especially if the independent contractor is creating the dangerous situation. *Bryant*, 694 S.W.2d at 446.

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Second, the argument for premises liability also fails as neither Oryx nor Weaver had control of the area with the missing handrail and were not aware that Pool removed the handrails. Weaver testified without contradiction that he never instructed or supervised Torrence or any other Pool employee. Without knowledge of the hazard and control of the work being done on the premises, Oryx cannot be held liable for the ensuing harm. Additionally, Weaver and Signa, did not have an affirmative duty to intervene and assist Pool or its employees. *Bryant v. Golf Oil Corp.*, 694 S.W.2d 443, 446 (Tex. App. 7th Dist. 1985).[6]

---

[6] As the evidence indicates that Weaver did not exercise any operational control over Pool, a discussion of whether or not

Plaintiffs also argue that Oryx and Signa had an independent individual duty of care under the OSHA and Coast Guard regulations: "Owners, operators, contractors, and subcontractors" owe independent duties to ensure workplace safety including harm from "recognized hazards" such as missing handrails. 33 C.F.R. § 142.4.[7] In particular, they argued that Weaver, Signa, and Oryx knew more than seven months prior to the accident that Pool intended to remove the handrails in order to load the equipment onto the platform. Because none of the defendants took any action to ensure that the work areas would be safe from "recognized

---

he acted as a "company man" for Oryx is unnecessary. Also, plaintiffs' argument that Weaver had discussed safety issues with workers and that Weaver had the same duties as an Oryx employee man is insufficient to establish that these acts transformed Weaver into an Oryx employee.

[7] Sec. 142.2 Duties of lessees, permitees, and persons responsible for actual operations: (a) Each holder of a lease or permit under the Act shall ensure that all places of employment within the lease area or within the area covered by the permit on the OCS are maintained in compliance with workplace safety and health regulations of this part and, in addition, free from recognized hazards; (b) Persons responsible for actual operations, including owners, operators, contractors, and subcontractor, shall ensure that those operations subject to their control are conducted in compliance with workplace safety and health regulations of this part and, in addition, free from recognized hazards; (c) "Recognized hazards," in paragraphs (a) and (b) of this section, means condition which are: (1) Generally known among persons in the affected industry as causing or likely to cause death or serious physical harm to persons exposed to those conditions; and (2) Routinely controlled in the affected industry.

hazards," plaintiffs contend they violated the Coast Guard and OSHA statutes.

Oryx oppose plaintiffs' argument on the grounds that controlling case now has established that the issuance of regulations by the U.S. Department of Interior (MMS) and the Coast Guard preempts and displaces any OSHA regulations. *Clary v. Ocean Drilling and Exploration, Co.*, 609 F.2d 1120 (5th Cir. 1980); *See also Marshall v. Nichols*, 486 F.Supp 615 (E.D.Tx. 1980). More importantly, the Fifth Circuit held in *Dupre v. Chevron U.S.A., Inc.*, that any claim based on the Code of Federal Regulations does not create an implied cause of action nor an independent duty on the platform owner such as Oryx. 109 F.3d 230 (5th Cir. 1997).

The plaintiffs' argument that *Dupre* is inapplicable because of minor factual differences is unpersuasive. Plaintiffs' contention that the handrails were in the sphere of overall operation of all the defendants does not successfully shift liability to the defendants. The evidence revealed that the defendants were not in operational control of the handrail removal process. By contrast, Pool was in complete control of the area in question at the relevant time.

CONCLUSION

The movants Oryx, Signs, and Weaver have established that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. The motions for summary judgment are GRANTED.

APPENDIX C

CODE OF FEDERAL REGULATIONS

TITLE 33 — NAVIGATION AND NAVIGABLE WATERS
CHAPTER 1 — COAST GUARD, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER N — OUTER CONTINENTAL SHELF ACTIVITIES
PART 142 — WORKPLACE SAFETY AND HEALTH
SUBPART A — GENERAL

Current through June 20, 20000; 65 FR 38332

§ 142.4 Duties of lessees, permittees, and persons responsible for actual operations.

(a) Each holder of a lease or permit under the Act shall ensure that all places of employment within the lease area or within the area covered by the permit on the OCS are maintained in compliance with workplace safety and health regulations of this part and, in addition, free from recognized hazards.

(b) Persons responsible for actual operations, including owners, operators, contractors, and subcontractors, shall ensure that those operations subject to their control are conducted in compliance with workplace safety and health regulations of this part and, in addition, free from recognized hazards.

(c) "Recognized hazards", in paragraph (a) and (b) of this section, means conditions which are —

(1) Generally known among persons in the affected industry as causing or likely to cause death or serious physical harm to persons exposed to those conditions; and

(2) Routinely controlled in the affected industry.

33 CFR § 142.4 and 33 CFR § 143.110

TITLE 33 — NAVIGATION AND NAVIGABLE WATERS
CHAPTER 1 — COAST GUARD, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER N — OUTER CONTINENTAL SHELF ACTIVITIES
PART 143 — DESIGN AND EQUIPMENT
SUBPART B — OCS FACILITIES

§ 143.110 Guards and rails.

(a) Except for helicopter landing decks which are provided for in paragraph (b) of this section, and areas not normally occupied, the unprotected perimeter of all floor or deck areas and openings shall be rimmed with guards and rails or wire mesh fence. The guard rail or fence shall be at least 42 inches high. The two intermediate rails shall be so placed that the rails are approximately evenly spaced between the guard rail and the floor or deck area: Provided, That if a toe board is installed then one of the intermediate rails may be omitted and the other rail placed approximately half way between the top of the toe board and the top guard rail.

(b) The unprotected perimeter of the helicopter landing deck shall be protected with a device of sufficient strength and size as to prevent any person from falling from such deck.

(c) Each catwalk and each stairway shall be provided with a suitable guard rail or rails, as necessary.

APPENDIX D

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 29 — SUBMERGED LANDS
SUBCHAPTER III — OUTER CONTINENTAL SHELF LANDS

Current through P.L. 106-170, approved 12-17-99

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, compensations shall be payable under the provisions of the Longshore and harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section —

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such

subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the state nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

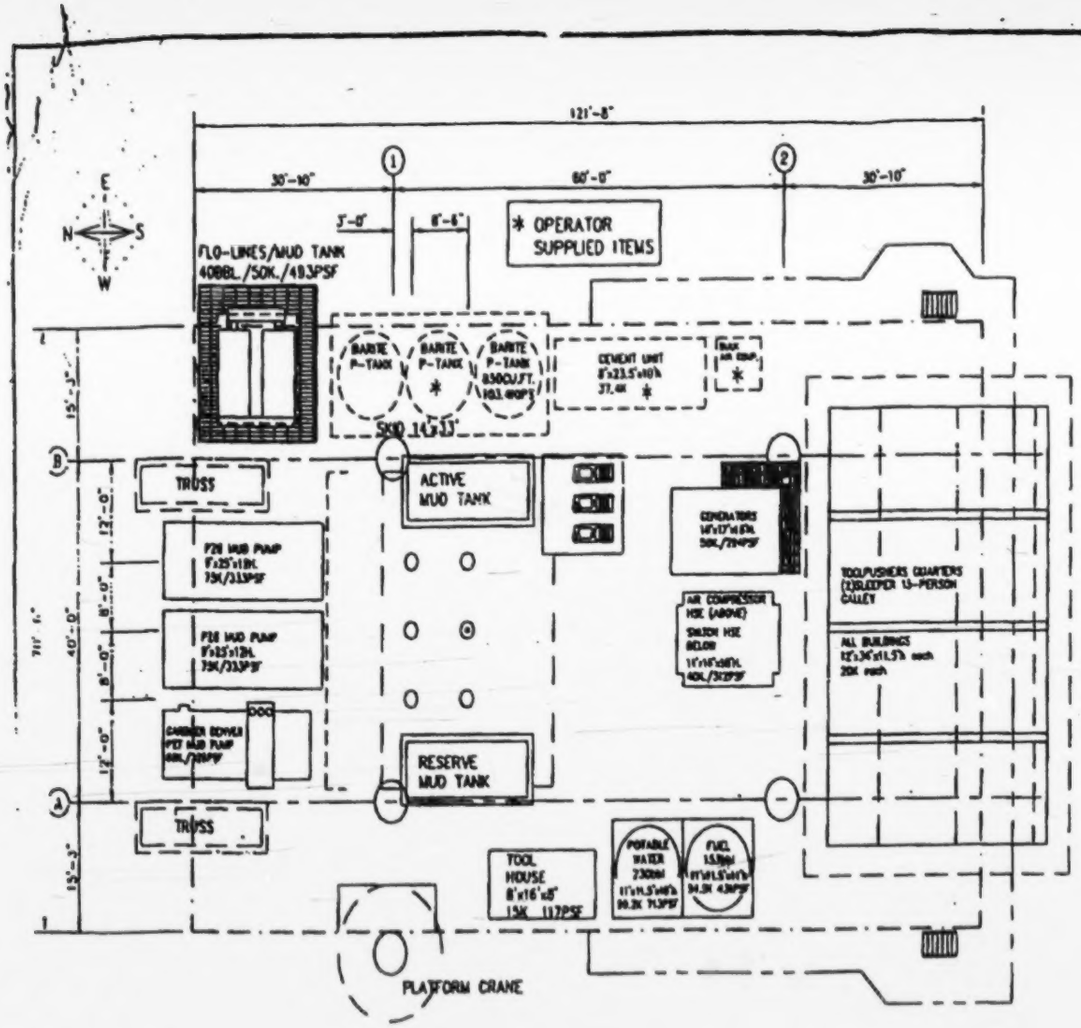
The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

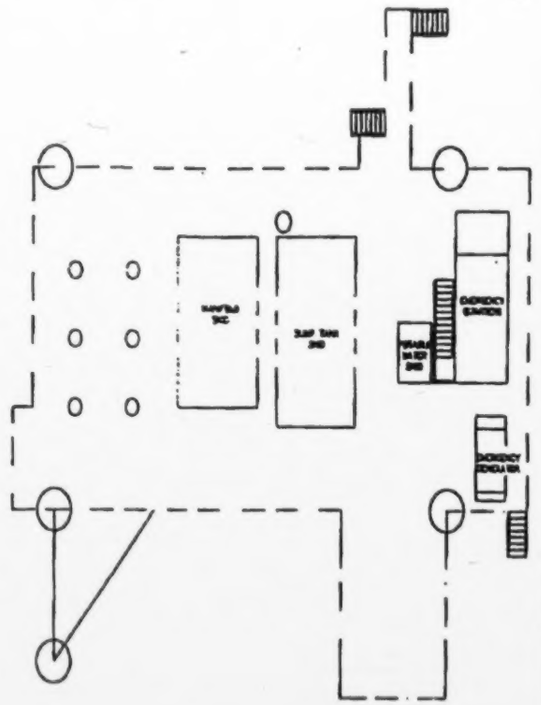
The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

APPENDIX E

DIAGRAM OF PLAN AND PRODUCTION DECK



PLAN @ MAIN DECK



PLAN @ PRODUCTION DECK

NO.	REVISION	MADE	DATE

ORYX

POOL COMPANY
GULF OFFSHORE OPERATIONS
HARVEY, LOUISIANA

SCALE	1/16"=1'-0"
DRAWN BY	RT
PLOT DATE	5/7/99
APPD BY	

Rig 143
Platform Arrangement
Plan @ Main Deck
High Island 385 "D"

DRAWING no. Proposal 1186B SHT 2 OF 2

(2)

No. 00-185

Supreme Court, U.S.
FILED
SEP 27 2000
CLERK

In the Supreme Court of the United States

SYLVIA SARTIN TORRENCE, individually and as legal guardian for the use and benefit of minor daughter, Jamira Dariel Torrence, and as administratrix at law of the estate of deceased husband, James Dariel Torrence; and NANNIE PETERS, individually and as legal guardian of the minor, Quadarius Rashad Gatlin

Petitioners,

v.

ORYX ENERGY COMPANY, SIGNA ENGINEERING CORPORATION and W.S. "BUDDY" WEAVER

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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25pp

PARTIES TO THE PROCEEDING

Respondents

Oryx Energy Company

Signa Engineering Corporation

W. S. "Buddy" Weaver

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STATEMENT OF THE CASE

James Dariel Torrence ("Torrence") was an employee of Pool Company ("Pool") assigned to work aboard Oryx Energy Company's ("Oryx") fixed platform in Block 385 of the High Island Area of the Gulf of Mexico, off the coast of the State of Texas on the Outer Continental Shelf. At all pertinent times Torrence was aboard the Oryx platform acting within the course and scope of his employment for Pool, who was on the Oryx platform performing workover drilling services as an independent contractor with the Pool platform drilling rig, "Rig 143".[1] Pursuant to another contract with Oryx, Signa Engineering Corporation ("Signa") employed W. S. "Buddy" Weaver ("Weaver") to serve aboard the Oryx platform as Oryx's company man.

As a part of its drilling operations, it is undisputed that Pool removed a portion of the Oryx platform's handrails in order to place on the platform the Pool drilling unit and mud pumps. After the Pool equipment had been placed on the platform, it is likewise undisputed there was a temporary gap in the handrails adjacent to the Pool mud pumps. On January 3, 1997, at approximately 6:30 a.m., Harry Loomis ("Loomis"), Pool's driller and Torrence's direct supervisor, decided that the gaps needed to be temporarily roped off until Pool welders could fabricate permanent handrails closing the gaps created by the overhanging mud pumps.

---

1 As the Court may be aware, a platform rig describes equipment used to provide workover and drilling operations on offshore fixed platforms. This equipment is transported to, and assembled onboard, a fixed offshore platform. A platform rig cannot move on its own, is not a vessel and does not float.

Loomis instructed Torrence to perform this job of roping off the gaps. The evidence shows that neither Weaver, nor anyone from Oryx or Signa, was involved in any of these decisions and that it was entirely Pool's responsibility to ensure that removing and replacing the handrails was performed safely. Weaver never gave Pool permission to remove the handrails, never instructed anyone to remove the handrails, and did not have knowledge about the gap in the platform's handrails which Pool had created.

Subsequent to Pool's driller assigning Torrence to rope off the gap in the handrails, Torrence apparently fell from the platform and into the waters of the Gulf of Mexico. Despite rescue efforts by the U.S. Coast Guard, among others, Torrence was never found and he is presumed dead.

On August 26, 1997 Petitioners filed suit against Oryx Energy Company, Signa Engineering Corporation and W.S. "Buddy" Weaver in the Civil District Court for the Parish of Orleans, State of Louisiana. Respondents subsequently removed Petitioners' claims to the U. S. District Court for the Eastern District of Louisiana based on the federal court's jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. §1333(a)(2)(A). Petitioners' Motion to Remand to state court was denied. Respondents thereafter individually filed Motions for Summary Judgment, which were granted on July 8, 1999 by the Honorable District Court Judge Helen G. Berrigan.

In its decision, the U.S. District Court for the Eastern District of Louisiana found that Respondents were not negligent in causing the death of Torrence as, under Texas law, they had no responsibility for the actions of their independent contractor, Pool. The court found that the undisputed evidence proved Oryx, Signa and Weaver did not maintain

any control over the actions of Pool, that they did not have an affirmative duty to intervene or assist Pool or its employees, and that Pool was in complete control of the area in question at all relevant times, including operational control of the handrail removal process. In so ruling, U.S. District Judge Ginger Berrigan expressly relied upon the Code of Federal Regulations sections cited by Petitioners herein and held that Respondents were not liable as the evidence revealed Respondents were not in operational control of the handrail removal process. Judge Berrigan also found that the recent U.S. Fifth Circuit Court of Appeals decision in *Dupre v. Chevron U.S.A., Inc.,* 109 F.3d 230 (5th Cir. 1997) controlled this case in that "any claim based on the Code of Federal Regulations [did] not create an implied cause of action nor independent duty on the platform owner such as Oryx."

Petitioner timely appealed this ruling to the U.S. Fifth Circuit Court of Appeals. In its opinion of May 5, 2000, the Fifth Circuit affirmed the District Court's decision in all respects, finding as a matter of law that under its prior jurisprudence Respondents were not liable for the Petitioners' alleged damages. Particularly, "the judgment of the District Court [was] affirmed essentially for the reasons stated in its thorough Order and Reasons of July 8, 1999."

ARGUMENTS FOR DENYING WRIT

Argument I

Petitioners have failed to offer compelling reasons for granting a Writ of Certiorari.

Rule 10 of the Rules of the United States Supreme Court specifically provides that "[r]eview on a Writ of

Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons." The principal purpose for which this Court grants Writs of Certiorari is to decide conflicting cases between the federal appellate courts and state courts regarding federal law. *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857 (1991).

To further elaborate on this rule, the Court has provided a non-exclusive list of cases which it generally accepts for decision on Writs of Certiorari. The present case does not approach these illustrations in any way. Particularly, the U.S. Fifth Circuit's opinion in the case *sub judice* does not conflict with the decision of any other court. In fact, both the U.S. District Court for the Eastern District of Louisiana and the U.S. Fifth Circuit Court of Appeals considered and analyzed virtually all of the arguments made by Petitioners herein, and also analyzed the statutes upon which Petitioners assert Respondents should be held liable. In this regard, both the District Court and the Court of Appeals held that this was simply a case of an independent contractor who had committed an act of negligence, and a principal who did not control the operational details of the independent contractor's work. Accordingly, Petitioners' arguments that this Court should exercise its supervisory power based upon an alleged departure from prior jurisprudence is wholly unfounded.

Petitioners have also failed to show that the U.S. Fifth Circuit's opinion in any way conflicts with the relevant decisions of this Court, or the other Courts of Appeals, regarding violations of the Code of Federal Regulations. To the contrary, the Fifth Circuit clearly followed the jurisprudence formulated by this Court and the other Courts of

Appeals when it held that an alleged violation of a Coast Guard regulation, in this case, did not implicate liability in the Respondents. In this regard, the Court of Appeals implicitly held that this case was within the four corners of its prior decision in *Dupre v. Chevron,* 109 F.3d 230.

In Petitioners' Petition for Writ of Certiorari the argument is made that the decisions of the courts below have created a conflict among the circuits because the holdings conflict with prevailing federal law stating that regulations set forth by the U.S. Coast Guard impose non-delegable duties, the violations of which constitute negligence *per se*. In support of their position, Petitioners cite 33 CFR §142.4 (1999) stating that:

> Each holder of a lease or permit under the Act shall ensure that all places of employment within the lease area or within the area covered by the permit on the OSC are maintained in compliance with work place safety and heath regulations of this part and, in addition, free from recognized hazards.
>
> Persons responsible for actual operations, including owners, operators, contractors and subcontractors, shall ensure that those operations subject to their control are conducted in compliance with work place safety and health regulations of this part, and, in addition, free from recognized hazards.

Based upon this section of the Code of Federal Regulations, Petitioners conclude that Oryx's non-delegable duty to Torrence was to ensure him with an absolutely safe place to

work, the violation of which imposes *per se* liability.

At the outset, it is undisputed that this case falls within the ambit of the Outer Continental Shelf Lands Act ("OCSLA"). According to the OSCLA, a fixed platform on the Outer Continental Shelf is an "artificial island" on which the law of the adjacent state controls, assuming such state law does not conflict with federal jurisprudence. 43 U.S.C. §1333(a)(2)(A); *Knapp v. Chevron U.S.A., Inc.*, 781 F.2d 1123 (5th Cir. 1986); *Houston Oil and Minerals Corp. v. American International Tool Company*, 827 F.2d 1049 (5th Cir. 1987), *cert. denied,* 484 U.S. 1067 (1988). In this case, Oryx's platform was located on the Outer Continental Shelf off the coast of Texas. Because it is undisputed that Texas substantive law does not conflict with applicable federal law, Texas law applies.

As has been held in the courts below, under Texas law a principal ordinarily cannot be held liable for the negligence of an independent contractor. Specifically, when the principal neither exercises nor retains operational control over the details of the independent contractor's work, nor fails to maintain his premises in a reasonably safe condition, and he warns any invitees of dangerous conditions not apparent to the invitee, that principal will not be held liable for the negligence of the independent contractor. *Bryant v. Gulf Oil Corporation*, 694 S.W.2d 443, 447 (Tex. App. 7th Dist. 1985). In Petitioners' petition to this Court, it is not disputed that Pool was Oryx's independent contractor. Moreover, Oryx neither maintained operational control over the details of Pool's work, nor failed to warn Pool of any non-apparent dangers existing on the Oryx platform.

In her well reasoned decision, Judge Berrigan stated that "...the undisputed evidence indicated that neither Oryx

nor Signa in fact exercised any such control . . ." as to make them liable for the possible torts of Pool. Moreover, the court also found that because neither Oryx nor Weaver had control over the area within the missing handrails and were not aware that Pool had removed the handrails, "...without knowledge of the hazard and control of the work being done on the premises, Oryx cannot be held liable for the ensuing harm."

Because the evidence is clear that Pool was Respondent's independent contractor and that all of the actions involved in causing Petitioners' alleged damages were controlled entirely by Pool, Petitioners now argue that a violation of a Coast Guard regulation creates negligence *per se* in Respondents, regardless of any evidence of negligence. Even assuming that such is true, which is specifically denied as discussed *infra*, Respondents did not breach any Coast Guard regulation because it is undisputed that Oryx's platform contained all of the required handrails prior to the time when Pool placed its drilling rig aboard the platform. The District Court held as much when it stated that Pool was in complete control of its "sphere of operations," including removing the Oryx platform handrails, and "the evidence revealed that [Respondents] were not in operational control of the handrail removal process". Thus, the evidence proved Oryx had satisfied its duty under 33 CFR §142.4(a) when it turned over its platform to Pool for Pool to perform its drilling work as an independent contractor.

As provided by 33 CFR §142.4(b), Pool was responsible for the "actual operations" conducted on Oryx's platform and Pool was responsible for "compliance with work place safety and health regulations" pertaining to its drilling work. As was set forth by the U.S. Fifth Circuit of Appeals

in *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548 (5th Cir. 1987), it is clear that Oryx can satisfy its duty by hiring an "experienced independent contractor" to perform work on its premises. It is simply without reason to hold a platform owner liable for the actions of its independent contractor for any alleged failure by that independent contractor to comply with applicable safety regulations. If the principal had maintained such supervision and control over the independent contractor's work as to ensure the independent contractor was complying with all applicable regulations, such would wholly defeat the independent contractor relationship. Under this scenario, a principal would always be liable for the negligence of an independent contractor, and would become the absolute insurer of all of the independent contractor's work. Clearly, this is not the law and Oryx must be allowed to rely upon the expertise of its contractor to undertake its work in an appropriate and safe manner, without becoming the complete insurer of all that happens aboard its platform. To hold otherwise would controvert the long line of jurisprudence establishing that, absent special circumstances, a principal is not liable for the torts of its independent contractor.

Argument II

Any violation of an OCSLA regulation does not create an implied cause of action for negligence *per se*, nor does it impose a nondelegable duty upon a platform owner to ensure that an independent contractor's work is carried out safely.

Petitioners argue vehemently that "a violation of U.S. Coast Guard regulation set forth in the Code of Federal Regulations constitutes negligence *per se*." *The*

Pennsylvania, 86 U.S. 125 (1874); *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394 (1958); *Jones v. Spentonbush-Red Starr Co.*, 155 F.3d 587 (2nd Cir. 1998); *Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933 (4th Cir. 1981); *Reyes v. Vantage SS Co., Inc.*, 609 F.2d 140 (5th Cir. 1996); and *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514 (9th Cir. 1996). Petitioners specifically argue that Oryx should be liable for alleged violations of 43 U.S.C. §1348(b)(1) (1999), 33 C.F.R. §142.4(a) (1999), and 33 C.F.R. §143.110(a) (1999). Despite these allegations, the long line of jurisprudence promulgated by the U.S. Fifth Circuit Court of Appeals and its sister courts has consistently rejected this argument. See *Dupre v. Chevron,* 109 F.3d 230; *Romero v. Mobil Exploration and Producing North America, Inc.*, 939 F.2d 307, 311 (5th Cir. 1991); *Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117, 1120 (5th Cir. 1978); and *Olsen v. Shell*, 561 F.2d 1178, 1187-90 (5th Cir. 1977), *cert. denied,* 44 U.S. 979 (1979).

At the outset, because the instant litigation arises from an accident on a fixed platform on the Outer Continental Shelf the rules of decision are those mandated by the Outer Continental Shelf Lands Act, 43 U.S.C. §1333(a)(2)(A). In addition to establishing that the law on fixed platforms on the Outer Continental Shelf is the law of the adjacent state, the OCSLA also provides that:

> The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters regulating the promotion of safety of

> life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

43 U.S.C. §1333(d)(1).

Moreover, the Secretary of the Department of the Interior and the Secretary of the department in which the Coast Guard is operating:

> . . . shall, in consultation with each other and, as appropriate, with the heads of other federal departments and agencies, promptly commence a joint study of the adequacy of existing safety and health regulations and of the technology, equipment and techniques available for the exploration, development, and production of the minerals of the Outer Continental Shelf. . . .In exercising their respective responsibilities for the artificial islands, installations, and other devices referred to in §1333(a)(1) of this title, the secretary [of the Department of the Interior], and the secretary of the department in which the Coast Guard is operating, shall require, on all new drilling and production operations, . . . the use of the best available and safest technologies which the Secretary [of the Department of the Interior] determines to be economically feasible. . . .

43 U.S.C. §1347(a-b) [2].

After a thorough review of the OCSLA and its accompanying regulations, the U.S. Fifth Circuit Court of Appeals in *Olsen* recognized that Congress' primary intent in passing the OCSLA in 1953 was "to assert United States jurisdiction over the Shelf, and to set up a system for the full development of its natural resources." *Olsen*, 561 F.2d at 1186-1188 (following *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975)). Because Congress provided "extensive civil remedies" to OCS workers via 43 U.S.C. §1333(a)(2)(A) and 43 U.S.C. §1333(b) (the Longshore and Harborworker's Compensation Act), the Fifth Circuit concluded Congress had already intended a civil remedy for breach of an OCSLA regulation and therefore did not need to create an implied cause of action. *Olsen*, 561 F.2d at 1189; *Bourg*, 578 F.2d at 1120.

In *Romero v. Mobil*, the Fifth Circuit expanded upon this principal when it stated that:

Private citizens are statutorily empowered to

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2 Prior to the 1978 amendment of OSCLA, the federal regulations concerning OCS installations were promulgated by the Secretary of the Interior, via the Minerals Management Service, and appeared in Title 30 of the Code of Federal Regulations. After the amendment, the Secretary of Transportation, via the Coast Guard, issued regulations concerning OCS installations, which presently appear in Title 33 of the Code of Federal Regulations. Because of the unique joint relationship between the Secretary of the Interior and the Secretary of Transportation, via the Coast Guard, for regulations concerning fixed platforms on the Outer Continental Shelf, Respondents refer to any regulation concerning OCS installations promulgated by any federal agency pursuant to the OCSLA as an "OCSLA regulation."

> commence civil actions to compel compliance with the Lands Act, 43 U.S.C. §1349, but no cause of action *ex delicto* is founded on that provision. . . . The federal government is empowered to seek equitable relief and civil and criminal penalties against violators of the Lands Act or leases, licensees, permits, regulations or orders promulgated under it. 43 U.S.C. §1350. Injured Lands Act workers and survivors of the slain workers are afforded relief under the provisions of the Longshore and Harborworkers Compensation Act, 33 U.S.C. §901 *et seq*. 43 U.S.C. §1333(b).

Romero, 939 F.2d at 309-10, N.5.

In *Romero,* the court found that the OCSLA simply did not create an implied cause of action for a breach of a regulation promulgated pursuant to authority granted by the OCSLA because the OCSLA itself granted a cause of action for workers injured on the Outer Continental Shelf. Such was also the holding in *Dupre v. Chevron* when the court stated that ". . . the regulations adopted pursuant to the Outer Continental Shelf Lands Act provide no basis for an implied cause of action . . . nor do those regulations create an independent duty . . . on the part of . . . the platform owner and principal to protect the contractor's employees from hazards create by the contractor." *Dupre v. Chevron*, 109 F.3d at 231. Although Petitioners acknowledge this precise issue was addressed by the U.S. Fifth Circuit Court of Appeals in *Dupre v. Chevron,* Petitioners state that "the lower courts have somehow determined that 33 CFR §142.4 and 143.110

were promulgated by the Minerals Management Service, an agency of the United States government which operates under the Department of Interior." What Petitioners fail to grasp is that the U.S. Fifth Circuit Court of Appeals in *Dupre* did not overlook the fact that these were regulations contained within the Coast Guard section of the Code of Federal Regulations when it determined they did not create an implied cause of action.

Specifically, in *Dupre*, the U.S. Fifth Circuit Court of Appeals followed its long line of jurisprudence in *Olsen, Romero* and *Bourg* and held that these regulations were promulgated pursuant to authority granted under the Outer Continental Shelf Lands Act. *Dupre v. Chevron*, 109 F.3d at 231. This issue was extensively briefed by the parties in *Dupre* and the court was undoubtedly well aware it was refusing to imply a federal cause of action for a breach of an OCSLA Coast Guard regulation when it refused to hold Chevron, as the platform owner, liable for the breach of an OCSLA regulation by its independent contractor. The court in *Dupre* simply held there is no federal implied cause of action for the breach of OCSLA or OCSLA regulations because OCSLA provides a cause of action in and of itself in 43 U.S.C. §1333(b).

Petitioners point the Court to *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421 (1985) for the proposition that the Coast Guard is the entity vested with the authority to enforce worker safety regulations on fixed platforms because "...those who do business on the great waters are very similar to those who do business in the great waters". Petitioners also argue that the failure to follow any Coast

Guard regulation will automatically constitute negligence *per se* because "...congress and the Coast Guard have recognized that the offshore locality of platform workers' work significantly affects their working conditions." Petitioners' arguments might be convincing but for the fact that they ignore prior jurisprudence holding there is no implied cause of action for a violation of a regulation promulgated pursuant to the authority granted by the OCSLA. Moreover, their arguments are derived solely from dissenting opinions and cases having nothing to do with fixed platforms.

While a cursory review of the cases cited by Petitioners will show that a violation of a Coast Guard regulation may constitute negligence *per se*, only *Herb's Welding* addressed the OCSLA, as the others were all concerned with Coast Guard regulations pertaining to seamen and maritime commerce, and *Herb's Welding* actually supports respondents' position. Specifically, in *Herb's Welding* the holding of this Court was that a worker injured on a fixed platform within the territorial waters of Louisiana was not covered by the Longshore and Harbor Worker's Compensation Act because his employment was not maritime and the OCSLA did not extend LHWCA benefits to workers inside of the three mile boundary. *Herb's Welding*, 470 U.S. at 427. In so ruling, the Court opined that drilling platforms "...are not even suggestive of traditional maritime affairs" because these are artificial islands with "...no more connection with the ordinary stuff of admiralty..." than piers. *Id.* at 424. Despite the dissenting language quoted in Petitioner's brief, *Herb's Welding* did not find that the Coast Guard had any special authority over fixed platforms, other than the authority granted to it by the OCSLA. To the contrary, even the dissent opined that the Coast Guard promulgated-

its safety regulations via the authority granted to it by Congress through the OCSLA. *Id.* at 439.

Addressing the other cases, *The Pennsylvania* involved interpretation of statutory rules regarding the signals ships must give while underway in fog. The Pennsylvania, 86 U.S. at 134. Other than the fact that *The Pennsylvania* involved a violation of a regulation, nothing in that case is applicable to the matter at hand. *Kernan v. American Dredging Co.* also has no bearing on this matter because *Kernan* only involved recovery for the death of a Jones Act seaman as a result of a violation of a statute concerning lighting equipment on a vessel. *Kernan*, 355 U.S. at 431. In *Kernan*, the court was clearly holding only that a violation of a Coast Guard statute pertaining to a vessel constituted negligence *per se*. *Id.*

Jones v. Spentonbush-Red Star Co. involved a seaman who suffered an eye injury while working as a deckhand aboard a tug boat. *Jones*, 155 F.3d at 590. In *Jones*, the seaman sued his employer under the Jones Act and general maritime law, and the court actually held that the employer was not liable for negligence *per se* because the defendant did not violate a Coast Guard, or maritime regulation, but instead violated an OSHA regulation. *Id.*

> This distinction in the source of defendant's statutory duty is key to this appeal. Unlike Coast Guard regulations and maritime statutes that are specifically aimed at shipping activities, *Jones* relies on a general work place safety regulation to obtain the same results in a maritime context. We do not think it was Congress' purpose for the Occupational Safety and Health Act to have

such an all encompassing effect.

Jones, 155 F.3d at 595 (emphasis supplied); *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 641, 100 S.Ct. 2844 (1980) ("The act was not designed to require employers to provide absolutely risk free work places."); *Titanium Metals Corporation of America v. Usery*, 579 F.2d 536, 543 (9th Cir. 1978) ("The act was never designed nor could it have been, to eliminate all occupational accidents.") Thus, *Jones* actually supports Respondents' position that violation of a non-maritime regulation is not negligence *per se*.

Like the cases mentioned above, *Duty v. East Coast Tender Service, Inc.* also does not support Petitioners' contentions because *Duty* only held that the violation of a Coast Guard regulation pertaining to a vessel may constitute negligence *per se*. *Duty*, 660 F.2d at 948. Both *Reyes v. Vantage S.S. Co., Inc.* and *Fuszek v. Royal King Fisheries, Inc.* follow this by holding the violation of Coast Guard regulations relating to seamen constitute negligence *per se*. *Reyes*, 609 F.2d at 143; *Fuszk, 98 F.3d at 517.* As mentioned, to assume that the same regulations that apply to vessels also apply to fixed platforms located on the Outer Continental Shelf stretches the realm of reasonable imagination.

Thus, for the Petitioners to now argue that the Coast Guard has original jurisdiction over fixed platforms and has the authority to promulgate safety regulations, the violation of which will create *per se* liability, clearly goes beyond the established holdings of this Court and the Courts of Appeals. Simply put, were it not for the Outer Continental Shelf Lands Act the Coast Guard would have no authority what-

soever over the activities occurring aboard fixed platforms on the Outer Continental Shelf. All of the cases cited by Petitioners which allegedly support their argument that the violation of Coast Guard statutes creates negligence *per se* dealt solely with the Coast Guard in its capacity as the entity charged with regulating vessels in maritime commerce. What Petitioners have failed to grasp throughout the course of this litigation is that this case does not involve traditional Coast Guard regulations pertaining to seamen and true maritime activities but rather involves a regulation promulgated by the Coast Guard under the OCSLA.

Because there is simply no distinction between the present case and *Dupre v. Chevron U.S.A., Inc.*, and the other established jurisprudence of this Court and the Courts of Appeals, the undeniable and undisputed evidence proves beyond any question of fact that Petitioners' application for a Writ of Certiorari should be denied.

Argument III

Texas law does not impose liability on a principal for negligence *per se* created by an independent contractor.

Finally, even if it is assumed the regulations promulgated pursuant to the Outer Continental Shelf Lands Act imposed a duty upon Respondents to prevent the injury which Petitioners are alleged to have sustained, which is herein specifically denied, because this accident occurred on the Outer Continental Shelf the substantive law of Texas will apply. In this regard, the Texas Supreme Court in *Perry v. S.N. & S.N.*, 973 S.W.2d 301 (Tex. 1998) held that even if such a violation of a regulation is found, Respondents still should not be held liable. Specifically, *Perry* set forth a five-

factor test to determine whether a statutory violation constitutes negligence *per se*. Although Petitioners do not mention this in their brief to this Honorable Court, the Texas Supreme Court in *Perry* declined to apply negligence *per se,* even though the defendant in that case had breached a federal statutory regulation, because such "would impose immense potential liability under an ill defined standard on a broad class of individuals whose relationship to the [accident] was extremely indirect . . . ." *Perry*, 973 S.W.2d at 309.

As in *Perry*, applying the doctrine of negligence *per se* in this case would impose "immense potential liability" under a statute which the U.S. Fifth Circuit Court of Appeals has already found to not create a cause of action. To extend liability to Respondents, as is argued by Petitioners, would simply destroy the line of recognized independent contractor cases by making platform owners the absolute insurers for the actions of independent contractors despite the independent contractor relationship. Moreover, lending credence to Petitioners' liability theories would expand the scope of the statutory language of the OCSLA beyond recognition in that the OCSLA deems fixed platforms to be federal enclaves in an upland state subject to the substantive laws of that state. Following Petitioners' line of reasoning, the Coast Guard would necessarily have regulation making authority over oilfield activities in upland Texas. Obviously, this is not the case. As such, Respondents respectfully pray that this Honorable Court reject Petitioners' arguments and deny their Petition for Writ of Certiorari.

CONCLUSION

The district and appellate courts below properly considered Petitioners' claims and properly granted Respondents' Motions for Summary Judgment. Petitioners have not now shown that there is any conflict in the circuits regarding violations of regulations promulgated pursuant to the Outer Continental Shelf Lands Act, nor have they shown any other source of potential liability by Respondents for their damages. Simply put, the courts below properly exercised their discretion in finding that the regulations promulgated pursuant to the Outer Continental Shelf Lands Act do not create either an implied cause of action nor a nondelegable duty on the part of a platform owner to prevent any and all injuries on its premises. Accordingly, Respondents pray that this Honorable Court decline to exercise its jurisdiction and deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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